(Original Civil Jurisdiction)

Gerahty, J.

October 10, 1932.

R. M . M. SUBRAMANIAN CHETTY..Plaintiff

vs.

MOHAMED ARSHAD.....Defendant

(Perak Civil Suit No. 342 of 1931)

Land Code 1926, *Section* 134—*Lien.*

A sale of land upon an application by a holder of a lien created in pursuance of the provisions of Section 134 of the Land Code 1926 is in the nature of a sale in execution and is governed by the provisions of the Civil Procedure Code in respect of such sales. No upset price should therefore be fixed.

In a suit to recover money due upon a Promissory Note coupled with the usual prayers for a declaration of a lien over lands under Section 134 of the Land Code 1926 and for an order of sale of such lands the Plaintiff was granted all the relief prayed.

The Order for Sale was issued and the Registrar fixed an upset price upon the same basis as is provided in the case of chargee proceedings under Section 149 of the Land Code 1926.

The Defendant applied for a stay of sale and the Plaintiff in a cross-application asked that the Order of Sale be set aside and a fresh Order issued without any upset price.

John L. Woods for the Plaintiff: The only statutory provision for upset prices is in the case of chargee Sales. Under Section 134 a suit is brought and the proceedings are under the Civil Procedure Code 1918. Section 134 merely creates the right and gives the lien holder priority in the sale which must be held under the Civil Procedure Code.

Defendant in person did not argue the point.

Gerahty J. delivered oral judgment as in the Head Note.

(Original Civil Jurisdiction)

Gerahty, J.

October 10, 1932.

HONGKONG AND SHANGHAI BANKING CORPORATION.....Chargee

vs.

P. L. S. L. P. L. KUMARAPPA CHETTY .....Chargor

(Perak Civil Application No.227 of 1932)

Land Code 1926, *Sections* 138, 139 and 149—*Notice.*

In the case of a charge payable on demand a chargee is not entitled to file a summons to show cause under Section 149 of the Land Code 1926 until after the expiration of one month from the service of the demand in writing pursuant to Section 139.

The words "default.....continuing for the space of one month" in Section 149 do not refer only to the minimum statutory period of default under Section 138 (i) (a) but also to Section 139.

On 15th October 1928 a charge from the Chargor to the Chargee substantially in the form of Schedule XXIV (c) and repayable on demand was registered over certain lands in the township of Ipoh.

On 24th day of August 1932 the Chargee sent to the Chargor a demand in writing to repay forthwith the principal sum and interest, and the same was received by the Chargor upon the 25th day of August 1932.

On 17th day of September 1932 the Chargee filed a summons to show cause under section 149 and the same came for hearing on the 3rd and 10th days of October 1932.

L. T. Williams for the Chargee: Section 139 absolves a Chargee from waiting for the period mentioned in Section 149. In an "on demand" Charge the default, under the latter Section, is complete when the Chargee has given reasonable time after his demand in writing to repay forthwith.

Section 138 sub-section (i) only requires one "notice in writing" that is of not less than 30 days, which covers the period of default referred to in section 149.

Section 139 provides that "a demand in writing" shall be equivalent to "the notice in writing" provided for by Section 138 sub-section (i) and that no other notice shall be required to create the default mentioned in Section 149.

John L. Woods for the Chargor: the only difference between cases under Sections 138 and 139 is that under Section 138 there are two periods and two defaults, under Section 139 one period and one default. The first default under Section 138 is automatic under the terms of the Charge. Thirty days thereafter notice may be given which creates the second default mentioned

in Section 149. Under Section 139 the first default and first period are excluded from on demand charges and the demand in writing takes the place of the formal notice Schedule XXIX and creates the default mentioned in Section 149. In either case the default upon which Section 149 is invoked must continue for one month before application is made.

L. T. Williams in reply.

Gerahty J., delivered oral judgment as in the Head Note.

(Original Civil Jurisdiction)

Thorne, Ag. C. J.

November 25, 1932.

YAP PIANG.....Plaintiff

v.

WONG LEE NAM.....Defendant

(Selangor Civil Suit No. 362 of 1932)

Civil Procedure Code, 1918, *Section* 492—*Arrest before judgment—Action for damages—Malice—Reasonable and probable cause—Termination of proceedings.*

An action for damages for alleged wrongful arrest before judgment, under Section 492 of the Civil Procedure Code, is analogous to an action for damages for malicious prosecution, and it is essential for the plaintiff to establish malice and the absence of reasonable and probable cause.

Where the person arrested furnishes security and is released, the proceedings on the warrant of arrest terminate as soon as the security has been furnished, and accordingly it is not a condition precedent in an action for damages for the alleged wrongful arrest to establish that the order for the issue of the warrant of arrest has been set aside.

The Hon. Mr. S. Veerasamy for the Plaintiff.

S. M. Sharma for the Defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. adv. vult.

Thorne, Ag. C. J.:— In this case the plaintiff sues the defendant for damages in the following circumstances. On the 4th day of June 1932, defendant brought a suit in the Magistrate's Court, Tapah, numbered 143/32, against the plaintiff to recover the sum of $216-89. On the same day he procured from the Magistrate an order for the arrest of the defendant before judgment. The plaintiff alleges that this order was obtained by the defendant on allegations which were false.

In pursuance of this order a warrant was issued from the Magistrate's Court, Tapah, under which the plaintiff was arrested at Puchong in the State of Selangor on the 11th day of June 1932, and on furnishing security to the police at Sungei Besi, was released.

Plaintiff alleges that the defendant's action was malicious, and was without reasonable and probable cause, and in consequence the plaintiff has suffered damage, and claims $1000/- general damages.

The defendant admits that he sued the plaintiff in the Magistrate's Court, Tapah, and that he applied for an order for the arrest of the plaintiff before judgment. He denies that the allegations made by him in support of this application were false, or that he acted maliciously and without reasonable and probable cause. He avers that he had reasonable cause for his action, and says that the proceeding in the Magistrate's Court, Tapah, resulted in judgment in his favour for the amount of the claim and costs.

By further defence the defendant contends that the order of the Magistrate, Tapah, for the issue of a warrant to arrest the plaintiff, not having been cancelled or discharged, the plaintiff here now has no cause of action against him.

The case was called on before me on the 3rd of November. Mr. Veerasamy for the plaintiff put in the following documents:—

1. the plaint in the Magistrate's Civil Suit No. 143/32;
2. the affidavit of the defendant which led to the issue of a warrant of arrest before judgment; and
3. the warrant issued under this order.

Mr. Sharma for the defendant then put in the notes made by the Magistrate, Tapah, in Civil Suit No. 143/32, and took as a preliminary objection the point raised by his further defence, and by arrangement, this was argued as a preliminary point. Mr. Sharma contended that in an action such as this to recover damages for the abuse of the ordinary civil process of the Court, the same principles of law are to be applied as in the case of an action for damages for malicious prosecution, except as to possibly the character or quantum of damages. He submitted that malice and the absence of reasonable and probable cause must be proved, as well as the fact that the proceeding determined in favour of the plaintiff.

He pointed out that in this case the order of the Magistrate, directing the warrant to issue, had not been set aside, and accordingly the plaintiff could not establish that the proceeding had been determined in his favour.

Mr. Veerasamy agreed that this action was akin to an action for damages for malicious prosecution and, as I understood him, conceded that it was essential for the plaintiff to establish both that the defendant acted maliciously, and had no reasonable and probable cause for the action which he took. But he said that in an action such as this the plaintiff cannot be put to proof of the favourable determination of the proceedings of which he complains.

I agree with counsel that this action is analogous to an action for damages for malicious prosecution, and that it is essential for the plaintiff to establish